UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PETER SANTOS MURILLO, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	CASE NO. C20-0484JLR (CR16-0113JLR) ORDER DENYING PETITION FOR HABEAS RELIEF AND MISCELLANEOUS MOTIONS

I. INTRODUCTION

Before the court are three motions filed by *pro se* Petitioner Peter Santos Murillo: (1) a 28 U.S.C. § 2255 petition for habeas corpus or motion to vacate, set aside, or correct Mr. Murillo's sentence (*see* Am. Pet. (Dkt. # 26)); (2) a motion to strike a response brief filed by Respondent United States of America ("the Government") (Mot. to Strike (Dkt. # 28)); and (3) a motion for a stay of this case (*see* Mot. for Stay (Dkt. # 36)[1]). The

[1] Mr. Murillo filed a document titled a "Request for Judicial Notice Under Rule 201 and Declaration in Support of Petitioner's Amended Section 2255 Motion." (*See* (Mot. to Stay Reply

Government filed a response to Mr. Murillo's § 2255 petition (Gov't Resp. (Dkt. # 29)), Mr. Murillo filed a reply (Pet'r Reply (Dkt. # 32)), and the Government filed a surreply (Gov't Surreply (Dkt. # 35)). The Government opposes Mr. Murillo's motion for a stay (Mot. for Stay Resp. (Dkt. # 37)), but did not file a response to the motion to strike (*see generally* Dkt.). The court has considered the motions, all submissions filed in support of and in opposition to the motions, the relevant portions of the record, and the applicable law. Being fully advised, the court DENIES each of Mr. Murillo's motions.

II. BACKGROUND

On February 20, 2016, police officers in Auburn, Washington responded to a traffic accident in which Mr. Murillo was the driver and lone occupant of one of the vehicles involved. (*See* Presentence Rpt. ("PSR") (CR16-0113JLR Dkt. # 112) ¶ 7.) Mr. Murillo provided officers with a false name and was then arrested for making a false statement. (PSR ¶ 7.) City of Auburn police officer Jeffrey Nelson was dispatched to the scene with a fingerprint scanner to help identify Mr. Murillo. (*See* 9/28/16 Hr. Tr. (CR16-0113JLR Dkt. # 107) at 11-12, 75.) Prior to joining law enforcement, Officer Nelson served twelve years in the United States Army as a weapons instructor for U.S., allied, and foreign forces. (*Id.* at 9.) His duties in that role included training soldiers on the functionality and recognition of weapons. (*Id.*) Officer Nelson used the scanner to check Mr. Murillo's fingerprints and confirm his identity. (*Id.* at 18.) The check also

(Dkt. # 38).) Because Mr. Murillo had already filed his reply to his § 2255 petition by the time he filed this additional brief, the court construes this filing as Mr. Murillo's reply in support of his motion to stay.

showed an outstanding U.S. Marshals felony warrant for probation violations for Mr. Murillo. (*Id.* at 18-19, 39-40.)

Officer Nelson testified at a suppression hearing that he approached the vehicle Murillo had been driving to close the driver's side door and turn off the engine. (*Id.* at 13-14). When he did so, he saw a pistol grip, frame, and rear portion of a pistol he recognized as a MAC-10 submachine gun sticking out from beneath a rubber floormat under the driver's seat. (*Id.* at 12-13). Officer Nelson lifted the floormat to confirm what he had seen was actually a firearm, then left the firearm where he found it and informed the lead officer, who immediately sealed the vehicle and had it impounded so that it could be searched. (*Id.* at 13-14, 29-31.)

The subsequent search uncovered, among other things, an additional firearm, false identification documents, and dealer-quantity amounts of heroin and methamphetamine. (PSR ¶ 11.) Mr. Murillo moved to suppress that evidence, claiming the initial search in which Officer Nelson saw the firearm was unlawful. (Mot. to Suppress (CR16-0113JLR Dkt. # 27.) The court denied Mr. Murillo's motion. (*See* 9/28/16 Min. Entry (CR16-0113JLR Dkt. # 54).)

At trial, a jury convicted Mr. Murillo of one count of Possession of Methamphetamine with Intent to Distribute under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A); one count of Possession of Heroin with Intent to Distribute under 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); and one count of Possession of a Firearm in Furtherance of Drug Trafficking under 18 U.S.C. § 924(c)(1)(A). (Jury Verdict (CR16-0113JLR Dkt. # 88).) After the jury returned its verdict, Mr. Murillo proceeded to a bifurcated stipulated-facts

bench trial in which he was convicted of one count of being a Felon in Possession of a Firearm under 18 U.S.C. § 922(g)(1). (*See* 10/18/16 Min. Entry (CR16-0113JLR Dkt. # 86); *see also* Gov't Resp., Ex. 2 (stipulated facts).) Because this was Mr. Murillo's second conviction for possession of a firearm in furtherance of drug trafficking, a twenty-five-year mandatory-minimum sentence applied and had to be served consecutively to the ten-year mandatory-minimum term that applied to his conviction under § 841(b)(1)(A). (*See* PSR ¶ 81); 18 U.S.C. §§ 924(c)(1)(C)(i), (D)(ii). In light of these applicable mandatory minimums, the Court imposed a sentence of thirty-five years. (*See* Judgment (CR16-0113JLR Dkt. # 116).)

Murillo raised seven issues on direct appeal. (*See* Am. 9th Cir. Op. (CR16-0113JLR Dkt. # 129) at 2-7.) The Ninth Circuit Court of Appeals rejected those arguments and affirmed his convictions. (*See id.*) Murillo filed a petition for certiorari with the Supreme Court, which was denied on March 25, 2019. (*See* Gov't Resp., Ex. 3.)

On March 19, 2020, Murillo mailed a motion pursuant to 28 U.S.C. § 2255 to the court, in which he stated ten grounds for relief. (*See* Pet. (Dkt. # 1).) The motion was filed on March 27, 2020. (*Id.*) On April 13, 2020, the court entered an order directing the United States to file an answer to Murillo's habeas motion. (4/13/20 Order (Dkt. # 7).) On May 27, 2020, the government filed its initial response to Mr. Murillo's petition. (*See* 1st Gov't Resp. (Dkt. # 13).) On July 22, 2020, the court granted Mr. Murillo's motion to amend his initial motion, directed the Clerk to file Mr. Murillo's proposed amended § 2255 motion, and ordered the government to file an answer to the

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amended motion. (*See* 7/22/20 Order (Dkt. # 25) at 4-5.) The amended motion states eleven grounds for relief:

> **Ground One:** Constitutional violations based on the Government's failure to disclose impeachment information about Officer Nelson. (*See* Am. Pet. at 5-6.)
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> **Ground Two:** Request for a new trial based on the newly discovered impeachment evidence described in Ground One to the extent it post-dates Mr. Murillo's trial. (*See id.* at 15.)
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> **Ground Three:** Ineffective assistance of counsel at trial for failing to discover the evidence described in Ground One. (*See id.* at 17.)
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> **Ground Four:** Ineffective assistance of counsel for failing to hire a gun expert who could have testified at the suppression hearing about whether an expert could have reasonably determined that the exposed item in Mr. Murillo's vehicle was actually a firearm. (*See id.* at 18.)
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> **Ground Five:** Due Process violation based on ineffective assistance of counsel for failing to investigate Mr. Murillo's competency and request a competency hearing. (*See id.* at 22-23.)
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> **Ground Six:** Ineffective assistance of counsel for failing to subpoena Angelica Briggs to testify to the possibility that she might have placed firearms belonging to her dead brother in the vehicle Mr. Murillo was driving. (*See id.* at 24.)
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> **Ground Seven:** Ineffective assistance of counsel for failing to request a jury trial on Count One despite knowing of biased comments the court made during a different proceeding. (*See id.* at 25-26.)
>
> **Ground Eight:** Ineffective assistance of counsel during 2005 criminal proceedings brought against Mr. Murillo, which resulted in a plea agreement and convictions that served as predicates in this case.[2] (*See* Pet'r Reply at 4.)

[2] Mr. Murillo's amended petition appears to describe Ground Eight as a claim for ineffective assistance of counsel for failing to object to the court's reliance on Mr. Murillo's 2005 convictions to enhance his sentence given that the 2005 convictions were obtained based on ineffective assistance of counsel. (*See* Am. Pet. at 27.) Mr. Murillo clarified on reply, however, that he "is challenging his 2005 convictions that served as predicates in this case as those

> **Ground Nine:** Ineffective assistance of counsel for failing to communicate with Mr. Murillo's immigration attorney regarding the immigration consequences of going to trial versus pleading guilty. (*See* Am. Pet. at 28.)
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> **Ground Ten:** Ineffective assistance of counsel for failing to object to an overly broad jury instruction defining the elements of 18 U.S.C. § 924(c). (*See* Am. Pet. at 29.)
>
> **Ground Eleven:** Due Process violation on grounds the Government failed to prove Mr. Murillo knew his status as a person barred from possessing a firearm. (*See id.* at 30.)

III. ANALYSIS

The court begins by briefly addressing Mr. Murillo's motion to strike and motion to stay before turning to the merits of the 11 grounds for relief stated in Mr. Murillo's § 2255 petition.

A. Motion to Strike

The court DENIES as moot Mr. Murillo's motion to strike. (*See* Mot. to Strike.) Mr. Murillo moves to strike as untimely the Government's response to Mr. Murillo's motion to amend his § 2255 petition. (*See id.* at 1-3.) Before Mr. Murillo filed his motion to strike, the court granted the Government's motion for an extension of time to file its response to Mr. Murillo's motion to amend. (*See* Order on Mot. for Extension (Dkt. # 24).) Additionally, the court ultimately rejected the arguments raised in the Government's allegedly untimely opposition and granted Mr. Murillo's underlying

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predicates were obtained in violation of [Mr. Murillo's] right to counsel." (Pl. Reply at 4.) Thus, the court construes Ground Eight as a challenge to Mr. Murillo's 2005 convictions.

motion to amend. (*See* 7/22/20 Order at 4-5.) Thus, Mr. Murillo's motion to strike the Government's opposition is moot.

B. Motion to Stay

Mr. Murillo argues that the court should stay its consideration of his § 2255 petition pending the completion of state court murder charges filed against Officer Nelson. (*See id.* at 1-2.) Mr. Murillo's § 2255 petition offers three arguments related to Officer Nelson: (1) the Government erred by failing to disclose Officer Nelson's impeachment evidence (Ground One) (*see* Am. Pet. at 5-6); (2) that Mr. Murillo's counsel provided ineffective assistance by failing to discover that impeachment evidence before trial (Ground Three) (*see id.* at 17); and (3) that a new trial is warranted due to acts of misconduct committed by Officer Nelson that post-date Mr. Murillo's trial (Ground Two) (*see id.* at 15).

The murder charges against Officer Nelson have no impact on Mr. Murillo's arguments on Ground One and Ground Three. The charges against Officer Nelson arise out of a 2019 officer-involved shooting. (*See* Gov't Resp. to Mot. to Stay at 1.) Mr. Murillo's trial occurred in October 2016. (*See*, *e.g.*, 10/19/16 Min. Entry.) Neither the Government nor Mr. Murillo's defense counsel could have erred by failing to disclose or discover information that did not yet exist.

As to Ground Two—Mr. Murillo's request for a new trial based on newly discovered impeachment evidence about Officer Nelson—the court concludes that a stay is unlikely to yield additional relevant evidence. The court is now apprised of the allegations against Officer Nelson and will consider what impact, if any, those allegations

have on Mr. Murillo's claims.[3] (*See* Mot. to Stay; Gov't Resp. to Mot. to Stay.) As such, a stay is unnecessary, as the court can resolve the merits of that claim based on the information currently available about Officer Nelson. Thus, the court DENIES Mr. Murillo's motion for a stay.[4]

C. Section 2255 Petition

1. Timeliness

a. Grounds One Through Ten

The court rejects the Government's argument that Grounds One through Ten are barred because Mr. Murillo did not timely mail his § 2255 petition. Pursuant to § 2255(f), a petition for habeas relief must be brought within one year of the date on which the judgment of conviction became final. 28 U.S.C. § 2255(f)(1). Because Mr. Murillo filed a petition for *certiorari* that was ultimately denied (*see* Gov't Resp., Ex. 3), Mr. Murillo's judgment of conviction became final on the date his petition for *certiorari*

[3] As discussed in more detail, below, the court concludes that evidence regarding Officer Nelson's post-trial conduct—including evidence related to the 2019 shooting—does not merit granting Mr. Murillo's request for a new trial. *See infra* § III.C.3.c. Thus, even if Officer Nelson is ultimately convicted of the charges filed against him, that would not impact the court's analysis of Mr. Murillo's § 2255 petition.

[4] The court also rejects the request for judicial notice included in Mr. Murillo's reply brief. (*See* Mot. for Stay Reply at 1-3.) Mr. Murillo's request for judicial notice is misplaced and unnecessary. Under Federal Rule of Evidence 201, "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The specific allegations against Officer Nelson that Mr. Murillo asks the court to judicially notice are the subject of contested criminal litigation and, as such, are not appropriate for judicial notice. However, because Mr. Murillo submitted these materials in support of his motion to stay and provided a declaration that properly attests to the authenticity of the evidence at issue, the court may consider that evidence without taking judicial notice. *See* Local Rules W.D. Wash. LCR 7(b)(3) (noting that a movant may submit supporting materials with a reply brief).

was denied, which was March 25, 2019. *See Gonzalez v. Thaler*, 565 U.S. 134, 149 (2012). Accordingly, Mr. Murillo was required to file his § 2255 petition by March 25, 2020.

Mr. Murillo's initial § 2255 petition was not filed on the court's docket until March 27, 2020. (*See* Pet. at 1.) However, the Rules Governing Section 2255 Proceedings for the United States District Courts state that "[a] paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing." *See* Rule 3(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (the "Section 2255 Rules").) Although Rule 3(d) states that an inmate may establish timely filing by filing a declaration or notarized statement that sets forth the date of deposit and states that first-class postage has been prepaid, the Ninth Circuit has clarified that courts may also consider other "probative evidence" in order to confirm that a petition was timely mailed. *United States v. Winkles*, 795 F.3d 1134, 1146 (9th Cir. 2015) ("[A]t a minimum, an inmate must file a sworn declaration or notarized statement as set forth in the rule to meet the initial burden of proving timely filing unless more probative evidence, such as the prison mail log, is available.").

Here, Mr. Murillo signed a sworn declaration that complies with 28 U.S.C. § 1746 indicating that his § 2255 petition was "placed in the prison mailing system on 3-19-2020." (Pet. at 22.) However, Mr. Murillo's initial declaration does not indicate that first class postage was prepaid (*see id.*), and the Ninth Circuit has held that Section 2255 Rule 3(d)'s requirement that a declaration include a statement that first class

postage was prepaid is mandatory, *see Winkles*, 795 F.3d at 1146-47. Mr. Murillo corrected any deficiency in his declaration by submitting a revised declaration in support of his reply in response to the Government's argument that clearly indicates that first class postage was prepaid. (*See* Murillo Decl. (Dkt. # 34) ¶ 3.) Thus, Mr. Murillo complied with Section 2255 Rule 3(d) and has established that his mailing was timely.[5]

b. Ground Eleven

The court agrees with the Government that Mr. Murillo did not clearly articulate whether Ground Eleven is based on the Government's alleged failure to prove Mr. Murillo knew he was a felon or the Government's alleged failure to prove that Mr. Murillo knew that, as a felon, he was prohibited from possessing a firearm. (*See* Gov't Resp. at 5-6.) The distinction matters for purposes of the Government's timeliness arguments. The Government concedes that Ground Eleven is timely if Mr. Murillo alleges that the Government failed to prove that Mr. Murillo knew he was a felon, as required by *Rehaif v. United States*, --- U.S. ---, 139 S. Ct. 2191 (2019). (*See* Gov't Resp. at 5-6.) Section 2255(f)(3) provides that the one-year limitation period for § 2255 motions runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made

[5] Indeed, the court notes that it finds the Government's timeliness argument to be disingenuous. As the Government concedes, the petition is date-stamped as being received by the mailroom at Mr. Murillo's correctional facility on March 23, 2020 (*see* Pet. at 24; Gov't Resp. at 5), which is all that is required by Rule 3(d), *see* Section 2255 Rule 3(d). The envelope that Mr. Murillo's petition was sent in also clearly indicates that Mr. Murillo adequately paid postage. (*See* Pet. at 23.) In fact, the petition was sent via certified mail, which can be easily tracked via a quick internet search. Thus, even if Mr. Murillo had not submitted a revised declaration, the court would conclude that there is sufficient "probative evidence" showing that Mr. Murillo's petition was timely filed. *See Winkles*, 795 F.3d at 1146-47

retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). The Government acknowledges that *Rehaif* articulated a new right requiring the Government to prove the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm" in order to obtain a conviction under 18 U.S.C. § 922(g). *See* 139 S. Ct. at 2200; (*see also* Gov't Resp. at 5-6). The Government also concedes that this ruling applies retroactively and that Mr. Murillo filed his petition within one year of the *Rehaif* decision.[6] (*See* Gov't Resp. at 6.) Thus, to the extent that Mr. Murillo raises a *Rehaif* claim in Ground Eleven, that claim is timely.

If, however, Mr. Murillo argues that the Government failed to prove Mr. Murillo knew he was prohibited from possessing a firearm, that claim is untimely. The deadlines in § 2255 cases are claim specific. *See Mardesich v. Cate*, 668 F.3d 1164, 1170-71 (9th Cir. 2012) (addressing timeliness issue in context of 28 U.S.C. § 2244(d), which is similar to 28 U.S.C. § 2255(f)). Mr. Murillo added Ground Eleven to his amended petition, which was first filed with the court on June 22, 2020 as part of Mr. Murillo's motion to amend. (*Compare* Am. Pet. at 30 *with* Pet.; *see also* Mot. to Amend (Dkt. # 19), Ex. A.) Ground Eleven does not relate back to any of the grounds that were timely

[6] The court notes that neither the Ninth Circuit nor the Supreme Court has determined whether *Rehaif* applies retroactively to cases on collateral review—especially where, as here, the § 2255 petition at issue is an initial petition for collateral review governed by 28 U.S.C. § 2255(f)'s one-year statute of limitations. Regardless, because the Government concedes that Mr. Murillo's *Rehaif* claim is timely, the court considers this argument waived and need not address whether *Rehaif* applies retroactively. *See United States v. Hill*, 915 F.3d 669, 673 n.1 (9th Cir. 2019) ("Because the government does not distinctly argue that [the petitioner's] claim is untimely under the one-year statute of limitations in 28 U.S.C. § 2255(f), it has waived this argument and we do not address it."); *see also Pough v. United States*, 442 F.3d 959, 965 (6th Cir. 2006) ("[T]he one-year statute of limitations for filing motions under § 2255 is not jurisdictional.").

filed, and is not based on a newly recognized rule if Mr. Murillo is not making a *Rehaif* claim and instead argues that the Government failed to prove Mr. Murillo knew he was prohibited from possessing a firearm. Thus, the court agrees with the Government that Mr. Murillo's argument is untimely if so construed.

In recognition of the court's obligation to liberally construe *pro se* filings, the court concludes that Mr. Murillo intends to raise a *Rehaif* claim. Although Mr. Murillo argues on reply that the Government failed to prove that "he knew he unlawfully was in possession of a firearm" and does not specifically argue that the Government failed to prove Mr. Murillo knew he was a felon, Mr. Murillo also cites *Rehaif* and refers to his claims as *Rehaif* claims. (*See* Pet'r Reply at 4-5.) Thus, the court construes Ground Eleven as a *Rehaif* claim that the Government explicitly concedes is timely.

2. Procedural Default

"The general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350-51 (2006). If a "defendant fails to raise an issue before the trial court, or presents the claim and then abandons it, and fails to include it on direct appeal" the issue is procedurally defaulted and may not be raised in a 28 U.S.C. § 2255 motion "except under unusual circumstances." *Thorson v. United States*, No. C18-136RSM, 2019 WL 3767132, *6 (W.D. Wash. Aug. 9, 2019) (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)). A defendant can overcome procedural default and have the court consider the merits of his 28 U.S.C. § 2255 claim in two ways: (1) by demonstrating both sufficient cause for the default and actual prejudice resulting from it;

or (2) by demonstrating that he is actually innocent of the offense. *Bousley*, 523 U.S. at 622; *see also United States v. Frady*, 456 U.S. 152, 167 (1982).

The Government argues that Ground Eleven—Mr. Murillo's *Rehaif* claim—is procedurally defaulted and not properly before the court.[7] (*See* Gov't Resp. at 8-9.) Mr. Murillo did not argue on his direct appeal that his conviction under § 922(g) violated his Due Process rights because the Government failed to prove that he knew that he was a felon. (*See* Am. Pet. at 2-3.) Thus, that claim is procedurally defaulted, meaning Mr. Murillo must establish either cause and actual prejudice or actual innocence in order to bring the claim on collateral review. *Bousley*, 523 U.S. at 622.

Mr. Murillo has not overcome his procedural default by demonstrating cause and prejudice. A defendant can demonstrate cause sufficient to excuse a default if he can show that an "objective factor external to the defense impeded counsel's efforts" to raise an issue. *Cook v. Schriro*, 538 F.3d 1000, 1027 (9th Cir. 2008) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Such an objective factor may be a "factual or legal basis for a claim [that] was not reasonably available to counsel." *Murray*, 477 U.S. at 488.

Mr. Murillo makes no serious effort to establish "cause" for failing to raise the *Rehaif* issue at trial or on direct appeal. (*See generally* Am. Pet. at 22; Pet'r Reply at 4-5.) The only argument he offers regarding cause is presented in his reply brief, in which he argues that the "cause" for failing to raise a *Rehaif* claim is that his counsel provided

[7] The Government concedes that procedural default does not impact Mr. Murillo's other grounds for relief. (*See* Gov't Resp. at 7-8.)

ineffective assistance. (*See* Pet'r Reply at 4-5.) Ineffective assistance of counsel claims may be brought on collateral review even where they are not raised on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 504 (2003). However, Mr. Murillo did not allege an ineffective assistance of counsel claim in Ground Eleven; he raised a Due Process claim based on the Government's alleged failure to prove that Mr. Murillo knew that he was a felon. (*See* Am. Pet. at 30). The Section 2255 Rules prohibit Mr. Murillo from raising new grounds for relief in his reply brief. *See* Section 2255 Rule 2(b) (stating that the § 2255 petition must "specify all the grounds for relief available to the moving party"); *see also United States v. Puerta*, 982 F.2d 1297, 1300 n.1 (9th Cir. 1992) ("New arguments may not be introduced in a reply brief."). If Mr. Murillo had intended to argue that his counsel was ineffective for failing to advance a *Rehaif* argument at trial or on appeal, then he should have presented such a claim in his § 2255 petition.[8] Because this is Mr. Murillo's only argument in support of cause to excuse his procedural default, the court concludes that his procedural default cannot be excused.[9] *See Frady*, 456 U.S. at 168 (holding that a defendant must show both cause and actual prejudice).

Even if Mr. Murillo could show cause, his *Rehaif* claim would still be procedurally defaulted for failure to establish prejudice. Mr. Murillo stipulated to his

[8] Grounds Three through Ten explicitly present ineffective assistance of counsel claims, which shows that Mr. Murillo is well-aware of the availability of such claims for collateral review.

[9] Although Mr. Murillo did not argue that his failure to raise a *Rehaif* claim at trial or on appeal should be excused on futility grounds, the court notes that it has already rejected that argument in a similar case and would have done so here on the same grounds had Mr. Murillo articulated that argument in his briefing. *See Mujahidh v. United States*, No. C19-1852JLR, 2020 WL 1330750, at *2-3 (W.D. Wash. Mar. 23, 2020).

status as a felon. (*See* Gov't Resp., Ex. 2.) His criminal history also includes prior felony convictions for harassment, unlawful possession of a firearm in violation of state law, possession of a firearm in furtherance of a drug trafficking crime, and possession of a firearm by a prohibited person in violation of federal law. (*See* PSR at 9-11). Mr. Murillo's federal convictions for possession of a firearm in furtherance of a drug trafficking crime and possession of a firearm by a prohibited person resulted in consecutive sentences of 60 months and 51 months, respectively. The Ninth Circuit holds that it is not "plain error" to fail to instruct a jury of the *Rehaif* rule that a defendant must have knowledge of his prohibited status where the defendant has stipulated to his status as a felon and has prior convictions for which he has been incarcerated for more than a year because, under those circumstances, the defendant cannot show that the alleged error affected his rights or impacted the fairness of the proceedings. *See United States v. Tuan Ngoc Luong*, 965 F.3d 973, 990 (9th Cir. 2020); *United States v. Johnson*, 963 F.3d 847, 854 (9th Cir. 2020). The threshold that Mr. Murillo must establish to overcome procedural default imposes a "significantly higher hurdle" than the plain error standard applied in *Johnson* and *Tuan Ngoc Luong*. *See Frady*, 456 U.S. at 166. Thus, the uncontroverted evidence showing that Mr. Murillo understood he was a felon prohibits him from establishing that he was prejudiced by the failure to raise a *Rehaif* argument at trial.

Finally, although Mr. Murillo fails to argue that he is "actually innocent" of the charge of prohibited person in possession of a firearm because he lacked knowledge that he was a felon (*see* Am. Pet. at 30; Pet'r Reply at 4-5), the court would reject that

argument even if Mr. Murillo advanced it based on the evidence establishing that Mr. Murillo was well-aware of his prior felony convictions and had been previously convicted of the exact same crime.

In sum, because Mr. Murillo cannot show cause and prejudice, or actual innocence, Ground Eleven is procedurally defaulted. Accordingly, the court rejects that ground for relief.

3. Merits of the Grounds for Relief

a. Evidentiary Hearing

As a preliminary matter, the court determines that an evidentiary hearing on the merits of this matter is unnecessary. Under § 2255, the court must hold an evidentiary hearing unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *see Frazer v. United States*, 18 F.3d 778, 781 (9th Cir. 1994). However, "[n]o hearing is required if the allegations, viewed against the record, either fail to state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989) (internal quotation marks omitted). Here, the court concludes that the detailed record in this matter—which Mr. Murillo has been given ample time to amend and supplement—is a sufficient basis on which to decide Mr. Murillo's claims and determine that he is entitled to no relief. As such, the court DENIES Mr. Murillo's request for an evidentiary hearing.

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b. *Ground One*

In Ground One, Mr. Murillo asserts violations of the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution based on the Government's failure to disclose impeachment evidence for Officer Nelson. (*See* Am. Pet. at 5.) It is well-established that the Due Process Clause requires prosecutors to produce "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment." *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). "*Brady* evidence" can be favorable "either because it is exculpatory or impeaching." *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013). However, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

According to the evidence submitted by Mr. Murillo, Officer Nelson had a lengthy history of disciplinary incidents at the time that he testified at Mr. Murillo's suppression hearing. (*See* Am. Pet. at 7-14.) Although the court certainly does not condone Officer Nelson's conduct, the court notes that Officer Nelson's disciplinary history pertains to use of force complaints and other misconduct complaints that have no bearing on the testimony that Officer Nelson presented at Mr. Murillo's suppression hearing or trial. (*See id.*) At the hearing, Officer Nelson testified that, after officers identified outstanding felony warrants for Mr. Murillo, Officer Nelson approached the vehicle Murillo had been driving to close the driver's side door and turn off the engine and, in the process, he noticed a MAC-10 submachine gun sticking out from beneath a rubber floormat under the driver's seat. (*See* 9/28/16 Hr. Tr. at 12-13). Officer Nelson lifted the floormat to

confirm what he had seen was actually a firearm, then left the firearm where he found it and informed the lead officer, who immediately sealed the vehicle and had it impounded so that it could be searched. (*See id.* at 13-14, 29-31.) Officer Nelson also offered similar testimony at Mr. Murillo's trial. (*See* 10/13/16 Hr. Tr. (CR16-0113JLR Dkt. # 104) at 15-27.)

Officer Nelson's history and alleged use of force violations have no bearing on the credibility of his eyewitness testimony or his character for truthfulness or untruthfulness. (*See* Am. Pet. at 7-14.) Even if the court had been presented with the full extent of Officer Nelson's disciplinary history at the suppression hearing, the court would still have found that Officer Nelson's testimony was credible and the plain view exception justified the limited search of the vehicle Mr. Murillo was driving. (*See* 9/28/16 Hr. Tr. at 116-119.) And if Mr. Murillo's counsel had attempted to impeach Officer Nelson with his disciplinary history at trial or the suppression hearing, the court would have excluded that evidence as improper character evidence under Federal Rule of Evidence 404 and an improper impeachment under Rule 608. *See* Fed. R. Evid. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."); Fed. R. Evid. 608(b). Thus, the court concludes that Officer Nelson's disciplinary history was not "material" evidence that the Government was required to disclose under *Brady* because there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

c. Ground Two

Ground Two alleges that a new trial is warranted based on Officer Nelson's post-trial disciplinary record. (*See* Am. Pet. at 15.) The court agrees with the Government that Ground Two should have been presented in a motion for a new trial based on newly discovered evidence under Federal Rule of Criminal Procedure 33 and not on collateral review of his conviction under 28 U.S.C. § 2255. The remedies of Rule 33(b)(1) and 28 U.S.C. § 2255 are "separate and distinct means of attacking a judgment." *United States v. Shaffer*, 789 F.2d 682 n.5 (9th Cir. 1986). "A *bona fide* motion for a new trial on the basis of newly discovered evidence falls outside § 2255[] because it does not contend that the conviction or sentence violates the Constitution or any statute." *United States v. Evans*, 224 F.3d 670, 673-74 (7th Cir. 2000). Thus, the court construes Ground Two as a Rule 33 motion for a new trial.

"A defendant who seeks a new trial based on new or newly discovered evidence must show that (1) the evidence is newly discovered; (2) the failure to discover the evidence is not attributable to a lack of diligence by the defendant; (3) the evidence is material to the issues at trial; (4) the evidence is neither cumulative nor impeaching; and (5) the evidence indicates that a new trial would probably result in an acquittal." *United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003) (citing *United States v. Jackson*, 209 F.3d 1103, 1106 (9th Cir. 2000)). Mr. Murillo has not met that bar here for a number of reasons.

First, Mr. Murillo's motion for a new trial fails to establish that the new evidence is material to the issues at Mr. Murillo's trial. The new impeachment evidence regarding

Officer Nelson's post-trial disciplinary record—including the recent murder charges relating to an officer-involved shooting—contains a litany of alleged uses of force that are similar to Officer Nelson's pre-trial disciplinary record. (*See* Am. Pet. at 7-15.) The bar for materiality under Rule 33 is higher than the materiality bar imposed by *Brady*. *See United States v. Miller*, 953 F.3d 1095, 1107 n.18 (9th Cir. 2020). In light of the court's conclusion that these disciplinary incidents were not material under *Brady*, it follows that they also cannot meet the higher materiality bar imposed by Rule 33. *See Miller*, 953 F.3d at 1107 n.18 ("[S]ince we hold that the evidence is not material under the *Brady* standard, *a fortiori* it is also not material under the Rule 33 standard.").

Second, even if Mr. Murillo could show that Officer Nelson's post-trial disciplinary history bears on Officer Nelson's credibility and could have been introduced during the suppression hearing or at trial to impeach Officer Nelson, the general rule is that evidence that would merely impeach a witness is not sufficient to warrant a new trial. *See United States v. Kulczyk*, 931 F.2d 542, 549 (9th Cir. 1991) ("[E]vidence that would merely impeach a witness cannot support a motion for a new trial."); *United States v. Alexander*, 695 F.2d 398, 402 (9th Cir. 1982) ("Evidence which is merely impeaching is not sufficient to support a motion for new trial."). Although there is a narrow exception to this rule for circumstances in which the impeachment evidence would render a witness's testimony "totally incredible" and that witness's testimony "provided the only evidence of an essential element of the government's case," *see United States v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992), the court concludes that Officer Nelson's disciplinary history does not rise to that level. *See, e.g.*, *United States v. Burleson*, No.

2:16-CR-46-GMN-PAL, 2017 WL 3174903, at *3 (D. Nev. July 26, 2017) (concluding that evidence regarding arrest of testifying law enforcement officer did not warrant a new trial because "it is apparent that even if relevant, this evidence would merely impeach [the officer's] credibility rather than independently support some aspect of the defense").

Finally, the court cannot conclude that the evidence related to Officer Nelson's post-trial disciplinary conduct is so severe that it "would probably result in an acquittal" if Mr. Murillo was re-tried. *See Waggoner*, 339 F.3d at 919. Even if the impeachment evidence presently before the court was admissible at the suppression hearing, admission of that evidence would not have resulted in the court ruling differently on Mr. Murillo's motion to suppress the firearm and the fruits of the search that occurred after Officer Nelson identified the firearm. Moreover, at trial, Officer Nelson's testimony was just one small piece of an overwhelming amount of evidence provided by the Government in support of Mr. Murillo's convictions, which means that the addition of impeachment evidence would not have resulted in acquittal. *See United States v. Kenny*, 645 F.2d 1323, 1344 (9th Cir. 1981) (affirming a district court's denial for a new trial because the newly discovered evidence "lacked sufficient probative force to acquit"); *Burleson*, 2017 WL 3174903, at *3 ("Additionally, the Court agrees that even if 'grave doubt' were cast upon [the testifying officer's credibility], the extensive evidence against [the defendant] does not indicate that a new trial would probably result in an acquittal."). Thus, the court also rejects Ground Two.

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d. Ineffective Assistance of Counsel—Grounds Three Through Ten

Each of Mr. Murillo's remaining grounds for relief raise ineffective assistance of counsel claims. (*See* Am. Pet. at 17-29.) Mr. Murillo's ineffective assistance of counsel claims are controlled by *Strickland v. Washington*, 466 U.S. 668 (1984). To show ineffective assistance under *Strickland*, a defendant must prove that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. With respect to the first prong, the defendant must show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. At this step, judicial scrutiny is highly deferential: there is a strong presumption that counsel's performance fell within the wide range of reasonably effective assistance. *Id.* at 689. With respect to the second prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Where the challenge concerns the sentencing phase—as Ground Eight does—the defendant must show counsel's performance caused the court to make some sort of error at sentencing, and that there is a reasonable probability that, but for this error, the court would have imposed a lesser sentence. *See Glover v. United States*, 531 U.S. 198, 203-04 (2001).

The court has thoroughly reviewed each of Mr. Murillo's grounds for ineffective assistance of counsel and concludes that each lacks merit.

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i. Ground Three

The court's analysis above regarding the impeachment materials for Officer Nelson disposes of Ground Three, which alleges that Mr. Murillo's counsel was ineffective for failing to obtain those impeachment materials. (*See* Am. Pet. at 17.) Even if the court assumed that Mr. Murillo's counsel acted ineffectively by not obtaining those materials, the court has already concluded that they were not material to Mr. Murillo's suppression hearing or sentencing.

ii. Ground Four

The court rejects Ground Four as overly speculative. Mr. Murillo argues that it was ineffective assistance for his counsel to decide not to hire a firearms expert to testify at trial or the suppression hearing regarding whether Officer Nelson could have identified the exposed item in Mr. Murillo's vehicle as a firearm. (*See* Pet. at 18.) Mr. Murillo fails to identify any expert who could have offered such testimony and provides no evidence that any such opinion would have qualified as expert testimony under Rule 702. (*See id.*) Thus, Mr. Murillo offers little more than speculation about the impact that testimony from a hypothetical firearms expert may have had on his trial or suppression hearing, and "[s]peculation about what an expert could have said is not enough to establish prejudice" under *Strickland*. *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1998). Accordingly, this claim fails.

iii. Ground Five

The court rejects Mr. Murillo's argument in Ground Five that his counsel was ineffective for failing to request a competency hearing. (*See* Am. Pet. at 22-23.) To be

competent to stand trial, "a criminal defendant must have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings." *Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981). "Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and assist counsel." *Godinez v. Moran*, 509 U.S. 389, 402 (1993). In a § 2255 proceeding, "the burden is upon the defendant to prove that he was not mentally competent to stand trial." *McKinney v. United States*, 487 F.2d 948, 949 (9th Cir. 1973). Here, the court's recollection of this case and of Mr. Murillo's testimony at his suppression hearing, specifically (*see* 9/28/16 Hr. Tr. at 57-66), demonstrates that Mr. Murillo was competent to stand trial. *See Gustave v. United States*, 627 F.2d 901, 903 (9th Cir. 1980) ("[A] judge's recollection of the events at issue may enable him summarily to dismiss a § 2255 motion."). Thus, his trial counsel's failure to request an evidentiary hearing was not ineffective assistance.

iv. Ground Six

In Ground Six, Mr. Murillo faults his counsel for failing to call Angelica Briggs as a witness at his trial. (*See* Am. Pet. at 24.) According to Mr. Murillo, Ms. Briggs was willing to testify that the firearms in the vehicle Mr. Murillo was driving belonged to her brother and that she had put the firearms in the vehicle. (*See id.*) However, the notes from Ms. Briggs' interview with an investigator hired by Mr. Murillo's counsel contradict this claim. (*See* Am. Pet. at 62-65.) According to the investigator's notes, Ms. Briggs told investigators that she did not leave any guns in the vehicle and did not

remember any guns in the vehicle when Mr. Murillo left. (*See id.*) The notes also do not clearly indicate whether Ms. Briggs was willing to testify on Mr. Murillo's behalf. (*See id.*) In fact, if anything the notes show that Ms. Briggs was evasive and difficult to get into contact with when the investigator attempted to reach her. (*See id.*) Regardless, to convict Mr. Murillo under §§ 922(g)(1) and 924(c), the government needed to show he possessed one of the firearms in the vehicle, not that he owned them. For purposes of those statutes, a person "possesses" a firearm if the person "knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it." *United States v. Thongsy*, 577 F.3d 1036, 1041 (9th Cir. 2009); *see also* Ninth Circuit Model Criminal Instruction 8.72. Thus, given that Ms. Briggs' testimony would have been irrelevant and unhelpful to Mr. Murillo, the court concludes that it was not unreasonable for Mr. Murillo's counsel not to call Ms. Briggs at trial.

v. Ground Seven

Ground Seven alleges that Mr. Murillo's counsel erred by failing to ask the court to recuse itself from this case and instead consenting to a bench trial on the 18 U.S.C. § 922(g) count for prohibited person in possession of a firearm. (*See* Am. Pet. at 25.) As the court concluded in a prior order, the court was not biased against Mr. Murillo and the statements that Mr. Murillo takes issue with "had no impact on Mr. Murillo or the fairness of his trial." (*See* 4/21/20 Order (Dkt. # 9) at 3-5.) Chief Judge Martinez affirmed that decision. (*See* 5/4/20 Order (Dkt. # 10) at 3.) Thus, Mr. Murillo cannot show that counsel's failure to seek recusal or the decision to consent to a bench trial prejudiced him as required by the second *Strickland* prong.

vi. Ground Eight

Ground Eight alleges that the Mr. Murillo's counsel erred at sentencing by failing to challenge Mr. Murillo's 2005 federal court convictions. (*See* Pet'r Reply at 4.) A defendant may not challenge a predicate conviction in the habeas context based on allegations of ineffective assistance of counsel unless the defendant brings *Gideon*-based claims for deprivations of the right to counsel. *See Custis v. United States*, 511 U.S. 485, 496-97 (1994). Because Mr. Murillo was represented by counsel in those proceedings (*see* PSR ¶ 41) and does not bring *Gideon* claims in this § 2255 petition, the court rejects his attempt to collaterally attack his predicate convictions.

vii. Ground Nine

In Ground Nine, Mr. Murillo claims his attorneys were ineffective because they failed to tell him that he could apply for asylum after ten years if he pleaded guilty instead of proceeding to trial. (*See* Am. Pet. at 28.) But any such advice from Mr. Murillo's counsel would have been inaccurate. Non-citizens convicted of aggravated felonies, which include convictions for violations of 18 U.S.C. § 922(g)(1), are statutorily barred from applying for asylum. In 2005, Mr. Murillo pleaded guilty to the crimes of Possession of a Firearm in Furtherance of a Drug Trafficking Crime under 18 U.S.C. § 924(c)(1)(A), and Possession of a Firearm by a Prohibited Person under 18 U.S.C. § 922(g)(1). (*See* PSR ¶ 41, Gov't Resp., Ex. 8.) His prior § 922(g)(1) conviction rendered him ineligible for asylum under 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i) and 8 U.S.C. § 1101(a)(43)(E)(ii), and would be unaffected by any plea agreement he might have entered into in this case. *See United States v. Castillo-Rivera*, 244 F.3d 1020, 1023

(9th Cir. 2001); *Abrego-Hernandez v. Holder*, 357 Fed. App'x 848, 849 (9th Cir. 2009) (unpublished). Mr. Murillo's attorney could not have been deficient for failing to advise him of a consequence that did not exist.

viii. Ground Ten

In Ground Ten, Mr. Murillo argues that his counsel was ineffective for failing to request a jury instruction that adequately articulated the elements of 18 U.S.C. § 924(c). (*See* Am. Pet. at 29.) Specifically, Mr. Murillo claims that the instruction failed to require the jury to find not only that he possessed a firearm, but also that he used it "in furtherance of" a drug-trafficking crime. (*See* Dkt. 26 at 29.) However, Jury Instruction No. 16, which covered the count of possession of a firearm in furtherance of a drug trafficking crime in violation of § 924(c), specifically instructed the jury that Mr. Murillo must have used the firearm in furtherance of a drug trafficking crime and provided a specific definition of "in furtherance of." (*See* Jury Instructions (CR16-0113JLR Dkt. # 84) at 17-18.) Moreover, Mr. Murillo's counsel specifically requested that the court include a definition of "in furtherance of" in the instruction. (*See* Def. Prop. Jury Instructions (CR 16-0113JLR Dkt. # 58) at 10.) Thus, the instruction included the language that Mr. Murillo claims his counsel should have asked for, and it was included at Mr. Murillo's counsel's request. As such, Mr. Murillo's counsel did not provide ineffective assistance and the court rejects Ground Ten.

D. Certificate of Appealability

The court also denies Mr. Murillo a certificate of appealability. When a district court enters a final order adverse to the applicant in a habeas proceeding, it must either

issue or deny a certificate of appealability, which is required to appeal a final order in a habeas proceeding. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability is appropriate only where the petitioner makes "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Under this standard, the petitioner must demonstrate that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. 28 U.S.C. § 2253; *Slack v. McDaniel*, 529 U.S. 473, 474 (2000). Here, the court finds that reasonable jurists could not debate whether Mr. Murillo's motion should have been resolved differently and therefore DENIES a certificate of appealability.

IV. CONCLUSION

For the reasons set forth above, the court DENIES as moot Mr. Murillo's motion to strike (Dkt. # 28), DENIES Mr. Murillo's motion to stay (Dkt. # 36), and DENIES Mr. Murillo's amended petition for relief under 28 U.S.C. § 2255 (Dkt. # 26). The court also DENIES a certificate of appealability.

Dated this 25th day of September, 2020.

JAMES L. ROBART
United States District Judge